Supreme Court, U.S.
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In The

# Supreme Court of the United States

VICTOR B. PUTZ,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Nebraska**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. Petitioner was convicted in a criminal trial where he was presumed to be innocent until proven guilty beyond a Reasonable Doubt. However, the jury instruction given defining "Reasonable Doubt" was no different than the definition used to define the lesser standard of "clear and convincing" evidence.

Is an accused denied due process of law when he is convicted for a crime under a "clear and convincing" burden masquerading as "guilt beyond a Reasonable Doubt?"

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| INDEX TO APPENDICES | iv |
| TABLE OF AUTHORITIES | v |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 4 |
| CONCLUSION | 14 |

## INDEX TO APPENDICES

Opinion, Supreme Court of Nebraska, Filed June 6, 2003 ..... App. 1

Opinion, Nebraska Court of Appeals, Filed August 20, 2002 ..... App. 23

Instructions of the Court, District Court of Sarpy County, Nebraska, Filed April 27, 2000 ..... App. 43

# TABLE OF AUTHORITIES

Page

CASES

*Cupp v. Naughton*, 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973) ..... 9

*Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) ..... 10

*State v. Perez*, 90 Haw. 113, 976 P.2d 427 (Haw. Ct. App. 1988) ..... 8

*U.S. v. Antero*, 121 F.3d 1256 (9th Cir) ..... 11

*U.S. v. Porter*, 821 F.2d 968 (4th Cir. 1987) ..... 11

*U.S. v. Rodriguez*, 163 F.3d 135 (1st Cir. 1998) ..... 11

*Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1984) ..... 9

STATUTES

28 U.S.C. §1254(1) ..... 1

OTHER

NJI 2d Civ. 2.12 B ..... 7

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the Supreme Court of Nebraska appears at Appendix App. 1 to this petition and is reported at 266 Neb. 37,662 N.W.2d 606 (Neb. June 6, 2003).

The opinion of the Nebraska Appellate Court appears at Appendix App. 23 to this petition and is reported at 11 Neb. App. 332, 650 N.W.2d 486 (Neb. App. Aug. 20, 2003)

## JURISDICTION

The Supreme Court of Nebraska decided petitioner's case on June 6, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

## STATEMENT OF THE CASE

**Petitioner.** The petitioner was a sole defendant charged with one count of First Degree Sexual Assault of a child and one count of Sexual Contact with a Child. Both counts arose out of one identical incident. After a jury trial, the defendant was convicted on both counts. On July 6, 2001 he was sentenced to a period of incarceration for two (2) to six (6) years on Count I, and to one (1) to two (2) years on Count II. These sentences were to run concurrently.

**Issues In The Proceeding Below:**

### A. TRIAL COURT

The defendant in this case was convicted on the uncorroborated testimony of the victim, a twelve (12) year old girl. The defendant did not testify.

The substance of the allegations was that the defendant sexually assaulted this young lady following a water-skiing trip. The defendant directed a horse-riding operation and club for young adults, of which the victim was a member.

Following this outing, the victim was waiting for a ride home at the defendant's home. At that time, she alleged that the defendant, in a single incident, removed her swimsuit, fondled her breasts, and penetrated her both orally and digitally. The incident lasted approximately ten (10) minutes.

The State's case consisted of the victim's testimony, and the testimony of a therapist limited to common reaction of minors to incidents of sexual assault. There was no other evidence presented to corroborate the victim's testimony.

At the close of trial the defendant objected to the Court's instruction on Reasonable Doubt, arguing that it both improperly defined the concept of Reasonable Doubt, and that it unconstitutionally lowered the burden of proof for the State in order to secure a conviction.

## B. APPELLATE PROCEEDINGS

The defendant appealed his conviction first to the Nebraska Court of Appeals alleging that the trial court erred in allowing him to be convicted of two crimes for one act, and in giving a jury instruction that improperly defined the meaning of Reasonable Doubt.

With respect to this instruction, the defendant's argument was two-fold. First, the instruction that proof beyond a Reasonable Doubt is proof that leaves the jury "firmly convinced," lowered the State's burden of proof. In fact, it was a definition of "clear and convincing" evidence, and not of Reasonable Doubt.

Second, that part of the instruction that if the jury thought that there was a "real possibility" the defendant was not guilty they should give him the benefit of the doubt, was an improper shifting of the burden of proof to the defendant. After briefs and argument, the Nebraska Court of Appeals affirmed the conviction.

The defendant next petitioned the Nebraska Supreme Court for further review. The Nebraska Supreme Court first concluded that the offense of sexual assault of a child is not a lesser-included offense of first-degree sexual assault.

With respect to the sufficiency of the Reasonable Doubt instruction, while the Court was critical of this

instruction, it affirmed the defendant's conviction none-the-less. It held that "while subject to valid criticism", it did not give rise to reversible error because the instructions, taken as a whole, adequately described the standard of proof beyond a Reasonable Doubt. "However, we take this occasion to urge that trial courts use the Nebraska pattern instructions on Reasonable Doubt."

## REASONS FOR GRANTING THE WRIT

### I. REASONABLE DOUBT HAS BEEN DOWNGRADED TO MEAN NOTHING MORE THAN CLEAR AND CONVINCING.

#### A. BACKGROUND

There are three standards of proof for juries in American jurisprudence. They are "guilt beyond a Reasonable Doubt," "clear and convincing," and "preponderance of the evidence." Of these three burdens of proof, the standard of guilt beyond a Reasonable Doubt is the highest. Since criminal cases involve the deprivation of life or liberty, Anglo-American jurisprudence has held always that for the State to convict a person on trial, it must meet the highest standard of law.

However, the jury instruction given in this case, and approved in a number of other jurisdictions dilutes this highest of standards, and renders it nothing more than a definition for the lesser standard of "clear and convincing" evidence.

The Court's instruction reads as follows:

> "The State has the burden of proving the defendant guilty beyond a reasonable doubt. *In civil*

> *cases, it is only necessary to prove that a fact is more likely true than not true*, but, in criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you *firmly convinced of the defendant's guilt*. There are very few things in this world that we know with absolute certainty, and, in criminal cases, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence, you are *firmly convinced that the defendant is guilty* of the crime charged, you must find the defendant guilty.
>
> If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the defendant the benefit of the doubt and find the defendant not guilty." (Emphasis added)

This instruction is constitutionally defective in three regards. First, it incorrectly implies that there are only two standards of proof, and not three. By stating that in civil cases, it is only necessary to prove a fact is more likely true than not true, it implies that this is the standard in all civil cases when it is not. The preponderance of evidence standard is the lowest standard applicable to only a percentage of all civil cases. Libel cases, certain fraud cases, certain cases on contracts and promissory notes, and a legion of others require "clear and convincing" evidence as the threshold burden.

Secondly, this instruction defines Reasonable Doubt in two separate places as being nothing more than being "firmly convinced" of the defendant's guilt. While it contains other language, the only definitional phrases with

respect to Reasonable Doubt defines it as nothing more than being "firmly convinced."

Third, the "real possibility that the defendant is not guilty" language included therein improperly shifted the burden of proof to the defendant.

For these three reasons this instruction is constitutionally defective.

## 1. CIVIL VERSUS CRIMINAL CASES

The Judge in this case told the jury, in effect, that there were only two standards of law or burdens of proof – one for civil cases, and one for criminal cases. This was a gross misstatement of the law, and one that denied the jury proper perspective. There are three burdens of proof – "guilt beyond Reasonable Doubt," "clear and convincing," and "preponderance of the evidence." Of these, "guilt beyond a Reasonable Doubt" is the highest, and a "preponderance of the evidence" is the lowest. In between stands "clear and convincing." If the Court felt obliged to instruct the jury on other standards of law, it should have done so accurately and completely.

The fact is that the jury instruction given in this case for Reasonable Doubt was nothing more than a definition for the lesser standard of "clear and convincing" evidence. No more, no less. The judge in this case rejected the Nebraska Pattern Jury Instruction for Reasonable Doubt, and crafted one of its own.

Yet when this Reasonable Doubt instruction is compared to the Nebraska Pattern Jury Instruction for Clear and Convincing evidence, the error is made quite clear.

**NJI 2d Civ. 2.12B**

**BURDEN OF PROOF – CLEAR AND CONVINCING EVIDENCE DEFINED.**

> "In this case, the plaintiff has the burden of proving (his, her, its) claims by clear and convincing evidence.
>
> Clear and convincing evidence means evidence that produces a firm belief or conviction about the fact to be proved.
>
> Clear and convincing evidence means more than the greater weight of the evidence, and less than proof beyond a reasonable doubt."

This pattern jury instruction makes plain that there are three standards of proof, and not two. It also defines the meaning of clear and convincing in terms of "a firm belief or conviction."

How then, can the language for this lesser standard of "a firm belief or conviction" be anything other than the language used twice in the defendant's Reasonable Doubt instruction of "firmly convinced of the defendant's guilt." They are one and the same. There is no way linguistically or semantically that "firmly convinced" can mean anything differently than "a firm belief or conviction."

Likewise, the pattern jury instruction for "clear and convincing" evidence used in almost all federal circuits uses the same terminology: that "clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue." *Federal Jury Practice and Instructions, O'Malley et al., Fifth Edition.*

So if "clear and convincing" evidence is truly a lower standard than "guilt beyond a Reasonable Doubt" then any

instruction that defines Reasonable Doubt as requiring only that the jury be "firmly convinced" is constitutionally deficient. For "a firm belief or conviction" conveys exactly the same notion as "firmly convinced."

However, since "Reasonable Doubt" requires more than "clear and convincing," then its definition must not be so easily confused with that of clear and convincing; and it must mean substantially more than being merely "firmly convinced."

A "clear and convincing" evidence instruction that masquerades as one for Reasonable Doubt in a criminal case denies a defendant due process of law.

### 2. FIRMLY CONVINCED?

The instruction in this case was unconstitutionally deficient and violated the defendant's rights to due process. In examining a similar instruction with the "firmly convinced" language, the Hawaii Court of Appeals held just that. This Court noted that "it is possible to be firmly convinced of a fact, yet still retain a Reasonable Doubt." The Hawaii Court held that the use of the "firmly convinced" language reduced the standard of Reasonable Doubt to that of "clear and convincing" evidence. *State v. Perez,* 90 Haw. 113, 976 P.2d 427 (Haw. Ct. App. 1988).

Throughout the Nebraska Supreme Court's opinion, it harshly criticized the use of this Reasonable Doubt instruction. However, notwithstanding that criticism, the court did not reverse because it held that the instruction, when considered as a whole, did not present a reasonable likelihood that the jury understood the instruction to allow

conviction based on proof less then proof beyond a Reasonable Doubt.

While this is the proper standard for review, it was an erroneous finding. The defendant concedes that this Court – the U.S. Supreme Court – has repeatedly emphasized that in construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole. See *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1984); *Cupp v. Naughton*, 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973).

However, all of the instructions taken as a whole must truly and properly inform the jury as to the law. Some instructions are much more important than others. Definitional instructions are important because they are the key to interpreting and applying the other instructions. And in all criminal cases, and of all instructions given there, the definition of Reasonable Doubt is the most important of all.

The Nebraska Supreme Court found that despite the inadequacy of the Reasonable Doubt instruction, the other instructions cured this inadequacy. This finding was erroneous.

The other instructions given, and those cited by the Nebraska Supreme Court as curing the deficiency, only pronounced that the standard of proof was one of Reasonable Doubt. None of these instructions provided a definition of what Reasonable Doubt actually was.

It would have been better, and constitutionally much safer, for the Court to omit a definition of Reasonable Doubt rather than to give an erroneous one.

None of the other instructions given erased the prejudice of the improper definition contained in instruction 6. Instruction number 2 was the presumption of innocence instruction. It merely stated the burden of proof as being beyond a Reasonable Doubt. Likewise, instruction number 3 did nothing more than inform the jury that the burden of proof beyond a Reasonable Doubt applied to all of the elements of each crime. It did so without a definition. Instruction number 5 reiterated the burden of proof being on the State, and that burden never shifts. It failed to define Reasonable Doubt or to offset in any way the false definition that was given to the Jury in the definitional instruction, which gave them the formula they required for determining Reasonable Doubt.

Viewed in the context of the overall charge to the jury taken as a whole, the jury still had no option but to apply a reduced standard for guilt in interpreting these other references to Reasonable Doubt, because it was instructed by definition that it could convict the defendant on what amounted to only "clear and convincing" evidence. This false definition thereby tainted all of the other instructions.

### 3. THE REAL POSSIBILITY

The presumption of innocence is a basic component of a defendant's right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Just as the defendant contends that "firmly convinced" cannot be equated with "beyond a Reasonable Doubt;" a "Reasonable Doubt" cannot be defined as a "real possibility of innocence." Such an instruction implies that the defendant must prove that there is a "real possibility" he is innocent. "Possibilities" of either guilt or innocence are matters

solely for argument. They have no business being included in an instruction involving Reasonable Doubt.

The defendant concedes that the Federal Courts have rejected the claim that the "real possibility" language constitutes reversible error. See *U.S. v. Rodriguez*, 163 F.3d 135 (1st Cir. 1998); *U.S. v. Antero*, 121 F.3d 1256 (9th Cir.). However, when the "real possibility" language is added to the confusion of the "firmly convinced" lesser standard language, it erodes the argument that the other instructions can cure all defects.

While the Court of Appeals for the Second Circuit did not find that the "real possibility" language constituted reversible error, it has warned that the use of this language may be perceived as shifting the burden of proof to the defendant. This court suggested "caution in the use of such language as it may provide a basis for confusion, and may be misinterpreted by jurors as inadvertently shifting the burden of proof to the defense."

In *U.S. v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987), the Fourth Circuit likewise warned of the dangers of confusion engendered by defining Reasonable Doubt in terms of a "real possibility":

> "The trial court did not explain the difference . . . between a 'possibility' and a 'real possibility.' It failed to tell the jury that the accused did not have the burden of showing a 'real possibility' of innocence. Implying the evidence must show a real possibility to justify acquittal treads on the principal that a defendant is presumed to be innocent . . . "

While the substantial rights of the defendant in that case were not prejudiced by this misleading language, the

rights of the defendant in this case were dramatically and unfairly prejudicial. In this case, the defendant found himself in a trial where he would be convicted on the lesser standard of "clear and convincing" evidence, and where he was then obligated to demonstrate to the jury the real possibility of his innocence.

## 4. THE PRESUMPTION OF INNOCENCE

The instruction used in this case not only lessens the burden of what Reasonable Doubt actually is, but it undermines the presumption of innocence.

The presumption of innocence is that special principle that makes America what it is and what separates our nation from other nations not so concerned with liberty and justice for all.

Blackstone in his "Commentaries" states that it be better that ten guilty men go free than to convict an innocent man. This is the historical and philosophical notion that underscores the meaning of "guilt beyond a Reasonable Doubt."

By reducing the concept of guilt beyond a Reasonable Doubt to nothing more than "clear and convincing proof" that hallowed presumption becomes corrupted. We will have lowered our standards. By doing so, we will then have dramatically increased the chances of the innocent being wrongfully convicted.

The concept of the presumption of innocence is the bedrock of our criminal justice system. It is a testimonial to who and what we are as a people. For we have decided as a country, it is far worse to increase the risk that an

innocent person might be convicted than to decrease the risk that a guilty person might go free.

Reasonable Doubt means much more than a combination of the two words reasonable and doubt. Reasonable Doubt means that we do not convict people unless there is certitude or a near certitude that they committed an offense. Reasonable Doubt tells the world where we stand; it announces to all what constitutes justice in America.

The present voices that encourage us to adopt the Federal Judicial Center's definition for Reasonable Doubt ask us to ignore the legacy of our past. These voices are attempting to pass off the lower standard of clear and convincing evidence for that of Reasonable Doubt.

The "firmly convinced" standard is not and never has been the definition of Reasonable Doubt. Instead it is the definition for clear and convincing evidence, and nothing more.

Reasonable Doubt means more than firmly convinced. It means a combination of reason and common sense that drives a juror to conclude a defendant is guilty without hesitation and without any articulable doubt. It is our highest standard of proof. It is not the intermediate one.

By allowing this instruction from the Federal Judicial Center to be utilized, we turn our back on our own legal history. We, in effect, will be announcing that we have changed direction as a country. It will be a sea change of monumental proportions. We will be declaring that from now on in America, it is more important to achieve a conviction than to worry about convicting an innocent man.

## CONCLUSION

The petitioner prays that the Court grant a writ of certiorari and set the case for briefing and plenary consideration.

Respectfully submitted,

VICTOR B. PUTZ, Petitioner
JAMES MARTIN DAVIS
DAVIS & FINLEY LAW OFFICES
*Counsel of Record*

## OPINION OF THE SUPREME COURT OF NEBRASKA

### Case Title

STATE OF NEBRASKA, APPELLEE,

V.

VICTOR B. PUTZ, APPELLANT.

### Case Caption

STATE V. PUTZ

Filed June 6, 2003. No. S-01-777.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge. Judgment of Court of Appeals affirmed.

James Martin Davis, of Davis & Finley Law Offices, for appellant.

Don Stenberg, Attorney General, Martin W. Swanson, and Kevin J. Slimp for appellee.

STATE V. PUTZ

Filed June 6, 2003. No. S-01-777.

1. **Jury Instructions**. Whether jury instructions given by a trial court are correct is a question of law.

2. **Judgments: Appeal and Error**. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.

3. **Jury Instructions: Proof: Appeal and Error**. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned

instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

4. **Due Process: Convictions: Proof**. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged.

5. **Constitutional Law: Jury Instructions: Proof**. As long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the U.S. Constitution does not require that any particular form of words be used in advising the jury of the prosecution's burden of proof.

6. **Jury Instructions**. In construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.

7. ___. Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.

8. **Lesser-Included Offenses**. In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.

9. ___. To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

## I. NATURE OF CASE

Victor B. Putz was convicted in the district court for Sarpy County of one count of first degree sexual assault and one count of sexual assault of a child. Putz was sentenced to 2 to 6 years' imprisonment on the first count and 1 to 2 years' imprisonment on the second count, with the sentences to run concurrently. Both counts involved the same victim. Putz appealed his convictions to the Nebraska Court of Appeals, and the Court of Appeals affirmed. *State v. Putz,* 11 Neb. App. 332, 650 N.W.2d 486 (2002). We granted Putz' petition for further review. We affirm.

## II. STATEMENT OF FACTS

On June 12, 2000, the State filed an information charging Putz with first degree sexual assault, a Class II felony in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), and with sexual assault of a child, a Class IIIA felony in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2002). A jury trial on these charges was held beginning April 24, 2001.

The main witness at trial was M.M., who testified that Putz sexually assaulted her in the summer of 1998. Evidence admitted at trial shows that in the summer of 1998, M.M. was 12 years old and Putz was 56 years old. M.M. was a member of a horse riding club run by Putz. In

addition to horse riding, the club would take part in other activities, including water-skiing.

M.M. testified that on the day of the incident, the club had been water-skiing. After the other children left, M.M. was alone with Putz at his home, and she was dressed in a swimsuit and shorts. M.M. testified that Putz removed her swimsuit and thereafter fondled and kissed her breast and her vagina. He also penetrated her vagina with his fingers. The incident ended when Putz' wife returned home. Putz then took M.M. home and told her to keep the incident a secret. She did not disclose the incident until April 27, 2000, when she told a therapist, Kimberly Plummer, about it. In addition to M.M.'s testimony, the State presented formal proof of the ages of Putz and M.M. and the testimony of Plummer, who testified regarding common reactions of minors who are victims of sexual assault.

After the State rested, Putz moved for a dismissal of the charges on the ground that the State had failed to prove a prima facie case. Specifically with regard to the charge of sexual assault of a child, Putz argued that there was no proof of separate acts of sexual contact and of penetration, but, rather, one continuous act. The court denied the motion.

In his defense, Putz presented the testimony of several children and parents who were familiar with the operation of Putz' riding club. The import of the testimony appeared to be that it demonstrated Putz' legitimate interest in and kindness to children, his routines which apparently did not present him with opportunities to be alone with the children, and the children's and parents' continued association with Putz after the incident with M.M. was reported. The testimony also disclosed some

minor differences between M.M.'s testimony and the recollection of the other children regarding collateral events.

Plummer was recalled during Putz' case. She testified regarding her therapy sessions with M.M. and her family and M.M.'s disclosure to Plummer on April 27, 2000, regarding the incident with Putz. During Plummer's testimony, Putz unsuccessfully attempted to enter certain other evidence which if admitted would have gone to M.M.'s credibility. Putz also called a child interview specialist associated with a child protection center as an adverse witness. She testified that she had interviewed M.M. for the State and that M.M. told her essentially the same version of events as M.M. had testified to at trial, with some variations. Finally, a doctor testified that he had treated M.M. on September 13, 2000, and that according to his dictated office notes, M.M. told him that the molestation occurred 6 months prior to July 2000.

The defense renewed its motion to dismiss both counts based on the State's purported failure to make a prima facie case and argued that the sexual assault of a child charge was a lesser-included offense of the first degree sexual assault charge. The district court overruled the motion to dismiss and concluded, based on the elements of the two offenses, that sexual assault of a child was not a lesser-included offense of first degree sexual assault.

At the jury instruction conference, Putz' counsel objected to the court's proposed instruction defining reasonable doubt. The court overruled Putz' objection and gave the following instruction:

> The State has the burden of proving the Defendant guilty beyond a reasonable doubt. In

> civil cases, it is only necessary to prove that a fact is more likely true than not true, but, in criminal cases, the State's proof must be more powerful than that. It must beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and, in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the Defendant the benefit of the doubt and find the Defendant not guilty.

The court also gave other instructions bearing a reasonable doubt which we recite in the analysis section of this opinion.

On April 27, 2001, the jury returned a verdict finding Putz guilty of both counts. On July 6, the district court sentenced Putz to concurrent terms of imprisonment of 2 to 6 years for first degree sexual assault and 1 to 2 years for sexual assault of a child. Putz' motion for new trial was denied, and Putz appealed.

On appeal to the Court of Appeals, Putz asserted that the district court erred in (1) convicting him for both an offense and a lesser-included offense based upon the same alleged act; (2) overruling his motion to dismiss, at the close of the State's case, as to the charge of sexual assault of a child by contact; (3) excluding testimony regarding prior statements and recantations made by M.M.; and (4)

submitting, over his counsel's objection, a jury instruction which (a) lowered the State's burden of proof from proving each element beyond a reasonable doubt to allowing a conviction if the jury is "firmly convinced" of the defendant's guilt and (b) shifted the burden of proof to the defendant to prove there was a "real possibility" of his innocence.

The Court of Appeals rejected Putz' assignments of error and affirmed the convictions. *State v. Putz,* 11 Neb. App. 332, 650 N.W.2d 486 (2002). We granted Putz' petition for further review of the decision of the Court of Appeals.

## III. ASSIGNMENTS OF ERROR

Putz asserts, restated and combined, that the Court of Appeals erred in (1) concluding that the reasonable doubt instruction given by the district court was without error and (2) affirming his convictions for both first degree sexual assault and sexual assault of a child because, on the facts alleged in this case, sexual assault of a child is a lesser-included offense of first degree sexual assault.

## IV. STANDARD OF REVIEW

Whether jury instructions given by a trial court are correct is a question of law. *State v. Haltom,* 263 Neb. 767, 642 N.W.2d 807 (2002). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the

questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

## V. ANALYSIS

### 1. REASONABLE DOUBT INSTRUCTION

In his first assignment of error on further review, Putz asserts that the Court of Appeals erred in concluding that the reasonable doubt instruction given by the district court was without error. Putz argues that the instruction is defective in two respects: (1) the "firmly convinced" language lowers the State's burden of proof and (2) the "real possibility" language shifts the burden of proof to the defendant to prove a real possibility that the defendant is not guilty. We conclude that although criticism of the challenged instruction is valid, the instructions taken as a whole correctly state the burden of proof, and that the giving of the reasonable doubt instruction was not reversible error.

We note first that a pattern instruction on reasonable doubt, NJI2d Crim. 2.0, has been suggested for use by Nebraska courts. NJI2d Crim. 2.0 provides as follows:

> A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

In *State v. Garza,* 241 Neb. 934, 960, 492 N.W.2d 32, 50 (1992), this court approved an instruction substantially

similar to the pattern instruction, finding that it "accurately defines the requisite standard of proof without minimizing the due process rights of" the defendant. Instead of using the Nebraska pattern instruction, the district court in this case used the instruction quoted in the "Statement of Facts" section of this opinion. Although we conclude that the instruction given in the present case does not result in reversible error, we do find the instruction to have its faults, and we take this opportunity to note that trial courts which do not follow NJI2d Crim. 2.0 risk the possibility that the instruction will be found to be erroneous and prejudicial.

(a) Jurisprudential Support for Instruction Given in This Case

In affirming the use of the reasonable doubt instruction given in this case, the Court of Appeals noted that instruction No. 21 from the Federal Judicial Center's pattern criminal jury instructions includes an instruction identical in substance to that given by the district court and that in a concurring opinion in *Victor v. Nebraska,* 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), Justice Ginsburg endorsed the pattern instruction. See Pattern Criminal Jury Instructions: Report of the Subcommittee on Pattern Jury Instructions (Comm. on the Oper. of the Jury Sys., Jud. Conf. of the United States, Fed. Jud. Ctr. 1987). Due in large measure to the Federal Judicial Center's recommendation and Justice Ginsburg's approval of the instruction, the language at issue in this appeal has been used by trial courts in several jurisdictions, which has in turn led to challenges on appeal under the Due Process Clause.

Federal courts have consistently rejected the claim that the "real possibility" language, criticized by Putz, constitutes reversible error. See, e.g., *U.S. v. Rodriguez,* 162 F.3d 135 (1st Cir. 1998); *U.S. v. Artero,* 121 F.3d 1256 (9th Cir. 1997); *U.S. v. Conway,* 73 F.3d 975 (10th Cir. 1995); *U.S. v. Williams,* 20 F.3d 125 (5th Cir. 1994); *U.S. v. Taylor,* 997 F.2d 1551 (D.C. Cir. 1993); *U.S. v. Porter,* 821 F.2d 968 (4th Cir. 1987); *United States v. McBride,* 786 F.2d 45 (2d Cir. 1986). Various state courts have also rejected challenges to instructions with the "real possibility" language. See, *Williams v. State,* 724 N.E.2d 1093 (Ind. 2000); *Merzbacher v. State,* 346 Md. 391, 697 A.2d 432 (1997); *State v. Darby,* 324 S.C. 114, 477 S.E.2d 710 (1996); *Smith v. U.S.,* 687 A.2d 1356 (D.C. 1996), *adhered to on rehearing* 709 A.2d 78 D.C. 1998); *Scott v. Class,* 532 N.W.2d 399 (S.D. 1995); *State v. Castle,* 86 Wash. App. 48, 935 P.2d 656 (1997).

Similarly, courts have almost unanimously rejected the claim that the "firmly convinced" language, challenged by Putz at trial and on appeal, is reversible error. See, e.g., *Harris v. Bowersox,* 184 F.3d 744 (8th Cir. 1999); *U.S. v. Brand,* 80 F.3d 560 (1st Cir. 1996); *Conway, supra*; *Williams, supra*; *Taylor, supra; U.S. v. Velasquez,* 980 F.2d 1275 (9th Cir. 1992); *U.S. v. Velazquez,* 847 F.2d 140 (4th Cir. 1988); *State v. Ferguson,* 260 Conn. 339, 796 A.2d 1118 (2002); *Merzbacher, supra*; *Smith, supra*; *State v. Van Gundy,* 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992); *State v. Merwin,* 131 Idaho 642, 962 P.2d 1026 (1998); *State v. Antwine,* 743 S.W.2d 51 (Mo.1987) (en banc); *Castle, supra*; *People v. Matthews,* 221 A.D.2d 802, 634 N.Y.S.2d 235 (1995).

Finally, we note that the Arizona Supreme Court has ordered that an instruction substantially similar to that

given in the present case be given in all criminal cases. *State v. Portillo,* 182 Ariz. 592, 898 P.2d 970 (1995) (en banc).

(b) Jurisprudential Criticism of Language in Reasonable Doubt Instruction

Despite the fact that courts have consistently concluded that the giving of a reasonable doubt instruction with language similar to the instruction in this case does not constitute reversible error, there has been significant criticism of both the "firmly convinced" and the "real possibility" language. Such criticism has come in cases both where courts find that the giving of the instruction is not reversible error but caution against use of the language and, in at least one case, where the court found the giving of the instruction to constitute reversible error.

With regard to the "real possibility" language, courts have cautioned that the language may be perceived as shifting the burden of proof to the defendant. The Court of Appeals for the Second Circuit did not find use of the "real possibility" language to constitute reversible error in *United States v. McBride,* 786 F.2d at 52, but the court suggested "caution in the use of such language as it may provide a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." The Court of Appeals for the Second Circuit stated that the "'hesitate to act'" language suggested in other pattern instructions on reasonable doubt would be preferable to the "real possibility" language. *Id.* We note that the Nebraska pattern jury instruction on reasonable doubt, NJI2d Crim. 2.0, recited above, contains "hesitation" language similar to that found preferable by the Court of Appeals for the Second Circuit.

In *United States v. Porter,* 821 F.2d 968, 973 (4th Cir. 1987), the Court of Appeals for the Fourth Circuit made the following observations regarding the confusion engendered by defining reasonable doubt in terms of a "real possibility" that the accused is not guilty:

> The [trial] court did not explain the difference that it perceived between a "possibility" and a "real possibility." It failed to tell the jury that the accused did not have the burden of showing a "real possibility" of innocence. Implying the evidence must show a real possibility of innocence to justify acquittal trenches on the principle that a defendant is presumed to be innocent. If the court believed that the jury could understand its concept of a "real possibility" and allocate the burden of proof on this issue, there was no reason for it to question the jury's ability to understand the prosecution's obligation to prove the charges beyond a reasonable doubt.

Despite these concerns, the Court of Appeals for the Fourth Circuit concluded that the instructions taken as a whole properly described the prosecution's burden and that the impropriety in using the "real possibility" language as well as the "firmly convinced" language did not affect the substantial rights of the accused.

The Hawaii Court of Appeals has held that an instruction similar to the one given in this case violated the due process clause of the Hawaii Constitution. *State v. Perez,* 90 Haw. 113, 976 P.2d 427 (Haw. App. 1998) (affirmed with respect to reasonable doubt instruction, reversed in part on other grounds by 90 Haw. 65, 976 P.2d 379 (1999)). While the Hawaii court indicated that the "real possibility" and certain other language of the instruction was problematic, it determined that the "firmly convinced" language was

the most compelling deficiency in the instruction. Noting that "it is possible to be firmly convinced of a fact, yet still retain a reasonable doubt," the Hawaii court determined that use of the "firmly convinced" language reduced the reasonable doubt standard "to one akin to the standard applied where the burden of proof required is that of clear and convincing evidence." *Id.* at 128, 976 P.2d at 442. The Hawaii court noted that its pattern instruction defined "clear and convincing evidence" as evidence which "'produces a firm belief about the truth of the allegations which the parties have presented'" and noted that clear and convincing is a lower standard of proof than proof beyond a reasonable doubt. (Emphasis omitted.) *Id.* The Hawaii court stated that the term "'firmly convinced'" was so similar to the term "'firm belief of conviction'" that use of the phrase "firmly convinced" lowered the standard of proof from beyond a reasonable doubt to the lesser standard of clear and convincing evidence and that therefore the language in such instruction failed to correctly convey the concept of reasonable doubt to the jury. *Id.* at 129, 976 P.2d at 443.

With reference to the Hawaii court's analysis, we note that Nebraska's civil pattern jury instruction, NJI2d Civ. 2.12B, provides, "Clear and convincing evidence means evidence that produces a firm belief or conviction about the fact to be proved." See, also, *Fales v. Norine,* 263 Neb. 932, 942, 644 N.W.2d 513, 521 (2002) ("clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved"); *In re Estate of Mecello,* 262 Neb. 493, 633 N.W.2d 892 (2001). The Nebraska civil pattern jury instruction NJI2d Civ. 2.12B also states that

clear and convincing evidence means less than proof beyond a reasonable doubt.

Finally, we note that the Court of Appeals for the Seventh Circuit warned of the dangers in attempting to define "reasonable doubt" in *United States v. Lawson,* 507 F.2d 433 (7th Cir. 1974), *cert. denied* 420 U.S. 1004, 95 S. Ct. 1446, 43 L. Ed. 2d 762 (1975), *and overruled on other grounds, United States v. Hollinger,* 553 F.2d 535 (7th Cir. 1977). The Court of Appeals for the Seventh Circuit noted that the words "reasonable doubt" were "ordinary English words of common acceptance" and stated that "[b]ecause of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion." *Lawson,* 553 F.2d at 442.

(c) Evaluation of Instructions Taken as Whole

Despite what we find to be valid criticism of the language of the reasonable doubt instruction given in this case, we conclude that Putz' rights, including his due process rights, were not violated by the giving of the instruction. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *Cage v. Louisiana,* 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), *disapproved on other grounds, Estelle v. McGuire,* 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, as long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the U.S. Constitution does not require that any particular

form of words be used in advising the jury of the prosecution's burden of proof. *Victor v. Nebraska,* 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). The U.S. Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. *Id.* We have held that the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. *State v. Davlin,* 263 Neb. 283, 639 N.W.2d 631 (2002).

In addition to the foregoing, we note that the U.S. Supreme Court has repeatedly emphasized that in construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole. See, e.g., *Victor, supra; Cage, supra; Cupp v. Naughten,* 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). See, also, e.g., *State v. Pruett,* 263 Neb. 99, 638 N.W.2d 809 (2002) (all jury instructions must be read together, and if, taken as whole, they correctly state law, are not misleading, and adequately cover issues supported by pleadings and evidence, there is no prejudicial error necessitating reversal).

Evaluating the instructions given in this case as a whole, we note that in instruction No. 2, the jury was instructed that Putz "is presumed to be innocent" and that "you must find him not guilty unless you decide that the state has proved him guilty beyond a reasonable doubt." Instruction No. 3, which set forth the elements of each of the two crimes with which Putz was charged, listed, for each crime, the "material elements which the State must prove by evidence beyond a reasonable doubt." Instruction No. 3 also instructed the jury that

> [t]he State has the burden of proving beyond a reasonable doubt each and every one of the material elements of a crime charged before the Defendant may be found guilty of that crime. If you find from the evidence beyond a reasonable doubt that each of the material elements of a charge is true, it is your duty to find the Defendant guilty of that charge. On the other hand, if you find the State has failed to prove one or more of the foregoing material elements beyond a reasonable doubt, on this count, you should find the Defendant not guilty of that charge.

Instruction No. 5 further provided that "[t]he burden of proof is *always on the State* to prove beyond a reasonable doubt all of the material elements of a crime charged *and this burden never shifts.*" (Emphasis supplied.) Finally, even within the instruction challenged in this appeal, the jury was reminded that "[t]he State has the burden of proving the Defendant guilty beyond a reasonable doubt."

Viewed in the context of the overall charge to the jury considered as a whole, the jury could not have interpreted the "real possibility" language as shifting the burden of proof to Putz. The jury was instructed several times that the burden of proof rested on the State, and the jury was explicitly told that this burden never shifts. The challenged instruction does not shift the burden of showing a "real possibility" of innocence; indeed, it does not allocate a burden and does nothing to contradict the other instructions and repeated emphasis that the burden of proof is on the State and never shifts. See, *U.S. v. Litchfield,* 959 F.2d 1514 (10th Cir. 1992); *U.S. v. Porter,* 821 F.2d 968 (4th Cir. 1987); *United States v. Gibson,* 726 F.2d 869 (1st Cir. 1984); *Williams v. State,* 724 N.E.2d 1093 (Ind. 2000);

*Smith v. U.S.*, 687 A.2d 1356 (D.C. 1996), *adhered to on rehearing* 709 A.2d 78 (D.C. 1998); *State v. Castle*, 86 Wash. App. 48, 935 P.2d 656 (1997).

Putz argues that the phrase "firmly convinced" connotes something less than the very high level of proof required by the Constitution in criminal cases. Putz' argument asks this court to judge the instruction in isolation. However, we are required to view the instructions as a whole to determine whether they adequately convey the concept of reasonable doubt. See, e.g., *Harris v. Bowersox*, 184 F.3d 744 (8th Cir. 1999). The instructions given in this case do not rely solely on the words "firmly convinced" to convey the meaning of reasonable doubt. See *id.* Viewed in the context of the entire charge, the "firmly convinced" language does not lessen the State's burden of proof in violation of due process. The instructions as a whole repeatedly emphasized the State's heavy burden of proof and explained how the State's proof must be "more powerful" than the burden of proof in civil cases. Taken as a whole, the instructions given in this case sufficiently set forth the State's burden of proving the material elements of each offense beyond a reasonable doubt. We agree with the Court of Appeals for the First Circuit which stated:

> Whether or not the "firmly convinced" definition alone would be constitutionally sufficient to convey the meaning of proof beyond a reasonable doubt, the court's further exposition here left no doubt that the jury's duty was to convict only upon reaching consensus as to guilt beyond a reasonable doubt. Nothing further is required.

*U.S. v. Brand*, 80 F.3d 560, 566 (1st Cir. 1996). Accord, e.g., *U.S. v. Williams*, 20 F.3d 125 (5th Cir. 1994); *State v.*

*Ferguson,* 260 Conn. 339, 796 A.2d 1118 (2002); *State v. Antwine,* 743 S.W.2d 51 (Mo. 1987) (en banc).

In analyzing Putz' argument, "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." (Emphasis in original.) *Victor v. Nebraska,* 511 U.S. 1, 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). The constitutional question, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the standard of *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (holding, inter alia, that due process requires proof beyond reasonable doubt of each fact necessary to constitute crime). See *Victor, supra.* Considering the instructions as a whole, there is not a reasonable likelihood that the jury understood the instructions to permit conviction of Putz based on proof insufficient to satisfy *In re Winship, supra.*

As we noted earlier, it would have been better had the trial court in this case given the reasonable doubt instruction set forth in the Nebraska Jury Instructions and previously approved by this court. See, NJI2d Crim. 2.0; *State v. Garza,* 241 Neb. 934, 492 N.W.2d 32 (1992). Adherence to a standard reasonable doubt instruction promotes uniformity and avoids the pitfalls of ad hoc interpretations and repetitive constitutional challenges. See *Smith v. U.S.,* 709 A.2d 78 (D.C. 1998). See, generally, Robert G. Nieland, Pattern Jury Instructions: A Critical Look at a Modern Movement to Improve the Jury System (1979). Furthermore, varying definitions "'[detract] from the goal of a uniform and equal system of justice.'" See *Smith,* 709 A.2d at 81, quoting *State v. Portillo,* 182 Ariz.

592, 898 P.2d 970 (1995) (en banc). "In a matter central to the determination of guilt or innocence, as this is, the appearance of evenhandedness, like the actuality, is important. 'Use of a standard definition thus will eliminate confusion and foster fairness for defendants, the [government], and jurors alike.'" *Id.* For these reasons, we have indicated that whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. See *State v. Dush,* 214 Neb. 51, 332 N.W.2d 679 (1983).

Notwithstanding the district court's deviation from the Nebraska Jury Instructions in this case, such deviation did not result in a constitutionally deficient instruction. The instructions given in this case, when considered as a whole, do not present a reasonable likelihood that the jury understood the instructions to allow conviction based on proof less than proof beyond a reasonable doubt. We therefore conclude that the Court of Appeals did not err in concluding that the reasonable doubt instruction given in this case did not give rise to reversible error.

2. LESSER-INCLUDED OFFENSE

In his second assignment of error on further review, Putz asserts that the Court of Appeals erred in concluding that sexual assault of a child was not a lesser-included offense of first degree sexual assault under the particular facts of this case. We note that Putz and the Court of Appeals have treated this issue as a lesser-included offense issue rather than a double jeopardy issue. We will therefore analyze this issue as it has been presented.

The Court of Appeals concluded that under Nebraska statutes, sexual assault of a child is not a lesser-included offense of first degree sexual assault. The Court of Appeals was correct. First degree sexual assault under § 28-319(1) is described as "subject[ing] another person to sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age." Sexual assault of a child under § 28-320.01(1) is described as "subject[ing] another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." The Court of Appeals noted that first degree sexual assault under § 28-319(1)(c) could be proved by showing the defendant was 19 years of age and the victim was 15 years of age, whereas sexual assault of a child under § 28-320.01 could not be proved unless the victim was 14 years of age or younger. The Court of Appeals also noted that § 28-319(1)(c) required proof of "sexual penetration" whereas § 28-320.01 required proof of "sexual contact" and that the definition of "sexual contact" in Neb. Rev. Stat. § 28-318(5) (Reissue 1995) requires that contact be "for the purpose of sexual arousal or gratification." We further note that the definition of "sexual penetration" in § 28-318(6) includes no intent element.

In petitioning for further review, Putz argues that because of the facts of the present case, sexual assault of a child was a lesser-included offense of first degree sexual assault because each charge was supported by the same set of facts and Putz was charged with two crimes based on the same actions. Putz' argument would require a court to look to the specific facts of his particular case in order to determine whether one crime is a lesser-included offense of the other. However, the test adopted by this court to determine whether one crime is a lesser-included offense

of another is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case.

In *State v. Williams,* 243 Neb. 959, 965, 503 N.W.2d 561, 565 (1993), we adopted a statutory elements test to determine whether an offense is a lesser-included offense of another and held that in order "'"[t]o be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser . . . ."'" We further stated that "in determining whether an offense is indeed a lesser-included one, a court initially does not look to the evidence in the particular case, but, rather, as the name of the statutory elements rule implies, looks only to the elements of the criminal offense." *Id.* "'To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.'" *State v. Smith,* 3 Neb. App. 564, 570, 529 N.W.2d 116, 121 (1995).

We find no error in the manner in which the Court of Appeals has applied the statutory elements test to the analysis of the statutes at issue in this case. Comparing the greater offense of first degree sexual assault, § 28-319(1)(c), to the lesser offense of sexual assault of a child, § 28-320.01, it is possible to commit the greater offense without at the same time having committed the lesser. Because the statutory elements test requires a court to look to the elements of the crimes and not to the facts of the case, we reject Putz' argument that we should initially examine the issue under the particular facts of this case. Putz argues that in so doing, we would be forced to conclude that sexual assault of a child is a lesser-included offense of first degree sexual assault under the facts of this

case. Contrary to Putz' argument, we conclude that the Court of Appeals correctly applied the *Williams* statutory elements test when it looked to the elements of the two offenses rather than the particular facts of this case and concluded that sexual assault of a child is not a lesser-included offense of first degree sexual assault. We therefore find no merit in Putz' second assignment of error on further review.

## VI. CONCLUSION

We conclude that the reasonable doubt instruction given by the district court in this case, while subject to valid criticism, did not give rise to reversible error because the instructions taken as a whole adequately described the standard of proof beyond a reasonable doubt. However, we take this occasion to urge that trial courts use the Nebraska pattern instruction on reasonable doubt. We further conclude that the Court of Appeals did not err in its holding that sexual assault of a child is not a lesser-included offense of first degree sexual assault. We therefore affirm the decision of the Court of Appeals which in turn affirmed Putz' convictions and sentences.

AFFIRMED.

OPINION OF THE NEBRASKA COURT OF APPEALS

(Designated for Permanent Publication)

Case Title

STATE OF NEBRASKA, APPELLEE,
V.
VICTOR B. PUTZ, APPELLANT.

Case Caption

STATE V. PUTZ

Filed August 20, 2002. No. A-01-777.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

James Martin Davis, of Davis & Finley Law Offices, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

STATE V. PUTZ

Filed August 20, 2002. No. A-01-777.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.

2. **Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of those determinations reached by the trial court.

3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, admissibility of evidence

is controlled by such rules and not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.

4. **Jury Instructions: Proof: Appeal and Error.** In an appeal premised upon a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

5. **Sexual Assault: Lesser-Included Offenses: Minors.** Sexual assault of a child is not a lesser-included offense of first degree sexual assault.

6. **Lesser-Included Offenses: Proof: Words and Phrases.** A lesser-included offense is one which is necessarily established by proof of the greater offense.

7. **Sexual Assault: Lesser-Included Offenses: Minors.** The application of the definitions in Neb. Rev. Stat. § 28-318 (Reissue 1995) makes the offense specified in Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2000) not a lesser-included offense of that specified in Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995).

8. **Witnesses: Rules of Evidence: Prior Statements.** Inconsistent statements made by a victim are relevant and would be admissible if offered in accordance with the rules of evidence.

9. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected and, in case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was

apparent from the context within which questions were asked.

10. **Evidence: Witnesses: Impeachment: Prior Statements.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him or her thereon.

11. **Constitutional Law: Convictions: Due Process: Proof.** The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires.

12. **Jury Instructions: Appeal and Error.** The correctness of jury instructions must be judged as a whole.

13. **Jury Instructions: Proof: Words and Phrases.** There is no reasonable possibility that a jury could interpret an instruction on the meaning of reasonable doubt to decrease the State's burden below that of proof beyond a reasonable doubt merely because the instruction would allow conviction if the jury is "firmly convinced" of the defendant's guilt when the jury is also instructed to give the defendant the "benefit of the doubt" if there is a reasonable possibility that the defendant is not guilty.

14. ___: ___: ___. When a jury instruction defining reasonable doubt is taken as a whole, the phrases "firmly convinced" (of a defendant's guilt) and "hesitate to act" (connoting doubt sufficient to cause a person to hesitate) are essentially two ways of conveying the same definition,

and in considering the instructions as a whole, the use of that language does not indicate to the jury that the prosecutor has a lesser burden.

HANNON, SIEVERS, and MOORE, Judges.

HANNON, Judge.

## INTRODUCTION

On the basis of one event, Victor B. Putz was convicted of first degree sexual assault (count I) and sexual assault of a child (count II), and he was sentenced to concurrent terms of imprisonment of 2 to 6 years on count I and 1 to 2 years on count II. Putz appeals, alleging the court erred in allowing him to be convicted of two crimes for one act, in excluding testimony that the victim made inconsistent statements and recantations, and in instructing the jurors that proof beyond a reasonable doubt is proof that leaves them "'firmly convinced'" of Putz' guilt, but that if they thought there was a "'real possibility'" he was not guilty, they should give him the benefit of the doubt. We find no merit in Putz' position and affirm.

## BACKGROUND

An information filed June 12, 2000, charged Putz with first degree sexual assault, a Class II felony in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), and with sexual assault of a child, a Class IIIA felony in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2000).

The evidence shows that the female victim, M.M., was 12 years old and that Putz was 57 years old in the summer of 1998, when the crimes took place. He ran a riding club,

and she was among a group of children who regularly rode his horses. On the day of the crimes, the other children had left after a waterskiing event and M.M. was alone with Putz at his home. She was dressed in swimwear and shorts, and Putz assaulted her at that time. We relate only the details which are necessary to establish elements of the crimes charged. She testified that after he removed her swimsuit, he fondled and kissed her breast and her vagina. He also penetrated her vagina with his fingers. A knock on the door by his wife ended the assault. A short time later, he took M.M. home, and at that time, he told her to keep the event a secret. She did not disclose the event until April 27, 2000, when she told a therapist, Kimberly Plummer, about the assault.

The State's case in chief consisted of M.M.'s testimony of the background and events of the crimes, formal proof of the ages of Putz and M.M., and Plummer's opinion that the common reactions of minors who are victims of sexual assault are guilt, shame, self-blame, and embarrassment.

After the State rested, Putz moved for a dismissal of the charges, specifically of count II, on the grounds that the State had failed to prove a prima facie case and that there was not a touching and then a separate act of penetration, but, rather, one continuous act. The court denied the motion.

Putz called as witnesses several children and parents that were familiar with the operation of Putz' horse riding club and the waterskiing he had sponsored. This testimony appears to have been an indirect manner of demonstrating Putz' legitimate interest in children, his kindness to them, his routines which apparently did not present him with opportunities to be alone with the children he

associated with, and their continued association with Putz after the crime occurred and even after it was reported. There were also some minor differences between the children's memories of collateral events and M.M.'s testimony regarding those events.

Plummer, an independent therapist with a master's degree, was recalled during Putz' case in chief. She testified that she started her therapy sessions with M.M., M.M.'s mother, and M.M.'s brother in January 2000 because M.M. had problems getting along with her family. The first time that M.M. disclosed the sexual assault was to Plummer on the following April 27. At that time, Plummer asked M.M. whether Putz had molested her, because M.M. had made reference to this possibility in a previous session. M.M. then told Plummer about the assault. The events she related to Plummer were quite similar to those M.M. later testified to at trial. Following the above testimony by Plummer, Putz' counsel asked Plummer, "Isn't it true that [M.M.] told you about more than just this one incident on this particular day?" An objection based upon relevance was made, and at a sidebar, Putz' counsel stated that M.M. had told Plummer and another forensic interviewer that she was molested twice, on two separate occasions, which issue would go to M.M.'s credibility. The State argued that there were never any questions posed to M.M. regarding any statements that she may or may not have made and that the defense could not recall her just for credibility issues. The court sustained the objection.

A child interview specialist associated with a child protection center was called as an adverse witness. She had interviewed M.M. for the State, and she testified essentially that M.M. told her the same story as M.M.

testified to at trial, with minor variations. We will not repeat the details.

Finally, a doctor testified that he had treated M.M. on September 13, 2000, and that according to his dictated office notes, M.M. told him that the molestation occurred 6 months prior to July 2000.

The defense renewed its motion to dismiss both counts for failure to make a prima facie case in that the State should not be allowed to obtain a conviction on both counts from the single event.

At the jury instructional conference, Putz' counsel objected to the court's proposed reasonable doubt instruction on the basis that the term "firmly convinced" was used. The court overruled the objection, and the court's proposed instruction was given. The jury found Putz guilty of both counts, and he was sentenced as set forth above. Putz' motion for new trial, which raised substantially the same issues as he raises in this appeal, was denied.

## ASSIGNMENTS OF ERROR

Putz alleges that the district court erred in (1) convicting him for both an offense and a lesser-included offense based upon the same alleged act; (2) overruling his motion to dismiss, at the close of the State's case, as to the charge of sexual assault of a child by contact; (3) excluding testimony regarding prior statements and recantations made by M.M.; and (4) submitting, over his counsel's objection, a jury instruction which (a) lowered the State's burden of proof from proving each element beyond a reasonable doubt to allowing a conviction if the jury is "'firmly convinced'" of the defendant's guilt and (b) shifted the burden

of proof to the defendant to prove there was a "'real possibility'" of his innocence.

## STANDARD OF REVIEW

Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of those determinations reached by the trial court. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

In proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules and not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

In an appeal premised upon a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001). Whether a jury instruction given by a trial court is correct is a question of law. *Id.*

## ANALYSIS

### *Can Defendant Be Convicted of Two Crimes on Basis of One Continuous Course of Conduct?*

Putz refers to sexual assault under § 28-320.01 as a lesser-included offense of § 28-319(1)(c). This is the basic fallacy of his argument on this issue. As will be explained,

established case law clearly holds that neither of these statutes is a lesser-included offense of the other.

Section 28-319(1)(c) provides that first degree sexual assault of a child is committed by "[a]ny person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is less than sixteen years of age." Subsection (1) of § 28-320.01 provides, "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." In addition to the slight differences in age for the victims of the two crimes, sexual contact is defined in Neb. Rev. Stat. § 28-318(5) (Reissue 1995) to "include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." The definition for sexual penetration contained in subsection (6) of that statute has no similar intent requirement.

The Nebraska Supreme Court has held that the sexual assault of a child is not a lesser-included offense of first degree sexual assault because first degree sexual assault could be proved by showing the defendant was 19 years of age and the victim was 15 years of age, whereas sexual assault of a child could not be proved where a victim was 15 because that statute requires that the victim be 14 years of age or younger. *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). This holding was based upon the holding in *State v. Arthaloney*, 230 Neb. 819, 433 N.W.2d 545 (1989), that a lesser-included offense is one which is necessarily established by proof of the greater offense. Under this rule, the *Beermann* court concluded that § 28-320.01 (Reissue 1985) was not a

lesser-included offense of the crime specified in § 28-319(1)(c) (Reissue 1985) in spite of the fact that the defendant was 35 years old and the victim was 10.

There is another reason why § 28-320.01 (Cum. Supp. 2000) is not a lesser-included offense of the crime specified in § 28-319(1)(c) (Reissue 1995), and the analysis and definitions in *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997), supply the precedent, although the statutes involved in *Schmidt* are different. In *Schmidt*, the defendant maintained that the court should have instructed that attempted sexual assault in both the second and third degrees under Neb. Rev. Stat. § 28-320(1) (Reissue 1989) was a lesser-included offense of attempted sexual assault in the first degree under § 28-319(1)(a) (Cum. Supp. 1994). Section 28-320(1) (Reissue 1995), the version applicable in the instant case, makes it a crime to subject another person to "sexual contact" without the victim's consent, and subsection (2) of that statute makes the crime a second degree offense if the assault causes serious bodily injury to the victim. The definition of the term "sexual contact" as used in § 28-320 and in § 28-320.01 (Cum. Supp. 2000) is given in § 28-318(5), and the part of that definition significant for the issue we are considering is that the sexual contact must be "for the purpose of sexual arousal or gratification." Section 28-318(6) defines sexual penetration, and that definition includes several types of penetration of the human body as sexual penetration, but it includes no intent element. The *Schmidt* court stated:

> In examining the elements of each crime, it is possible to have sexual penetration as defined [in § 28-318(6) (Reissue 1989)] without having sexual contact as defined [in § 28-318(5)]. Whereas

> the latter requires that the sexual contact be "for the purpose of sexual arousal or gratification," the former does not require the same.

5 Neb. App. at 675-76, 562 N.W.2d at 875-76. The *Schmidt* court cited *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), for the rule that "for an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense." 5 Neb. App. at 675, 562 N.W.2d at 875. (This is the same definition from *State v. Arthaloney*, *supra*, used by the court in *State v. Beermann*, *supra*.) The *Schmidt* court stated that "'there may be sexual contact without sexual penetration, but, ordinarily, sexual penetration does not exist without some form of sexual contact.'" 5 Neb. App. at 676, 562 N.W.2d at 876. It reasoned that "ordinarily" (emphasis omitted) was not the test under *Williams* and that "[w]hile our conclusion is not consistent with the idea of sexual penetration in its customary sense, it is a result mandated by our reading of *Williams*, which we are compelled to follow." *State v. Schmidt*, 5 Neb. App. at 676, 562 N.W.2d at 876.

Upon the same reasoning, we conclude that the application of the definitions in § 28-318 (Reissue 1995) makes the offense specified in § 28-320.01 not a lesser-included offense of that specified in § 28-319(1)(c) (Reissue 1995). Therefore, the trial court did not err when it submitted the two separate crimes to the jury in spite of the fact that both crimes resulted from the same course of conduct. Putz argues that to convict him of two crimes as a result of one continuous course of conduct is unfair. We observe that the trial court sentenced Putz to concurrent sentences, thus considerably alleviating the effect of Putz' being convicted of two crimes.

*Did Trial Court Improperly Exclude Testimony Regarding Prior Statements and Recantations Made by Minor Victim?*

Putz alleges he was prejudiced by the trial court's exclusion of "evidence pertaining to the credibility of [M.M.'s] uncorroborated testimony." Brief for appellant at 10. This refers to a question attempted to be asked of Plummer, the therapist who counseled M.M. and the first person whom M.M. told of the sexual assault. Plummer was called as a witness by the defense. Without objection, she testified about what M.M. told her of the assault. She was asked, "Isn't it true that [M.M.] told you about more than just this one incident on this particular day?" The State objected, and in a sidebar conference, Putz' counsel stated that M.M. had separately told Plummer and another interviewer she had been molested on two separate occasions and that this evidence would go to M.M.'s credibility. In the sidebar, defense counsel stated in effect that he understood the court's ruling to be that he was to stay away from the subject. No further offer of proof was made.

Putz cites *U.S. v. Demarrias*, 876 F.2d 674 (8th Cir. 1989), for the proposition that testimony regarding a minor victim of sexual abuse was admissible only with regard to the victim's credibility, and *U.S. v. Waters*, 194 F.3d 926 (8th Cir. 1999), for the proposition that courts look upon recantations with suspicion. Upon that authority, Putz' counsel argues the inconsistencies in the instant case could lead to a reasonable doubt. The State answers this argument by pointing out that the record does not show that M.M. recanted her story. At the time the question was asked of Plummer, her testimony was consistent with the testimony that M.M. had given when she testified. If Plummer testified that M.M. had told her of other

assaults or had recanted something she had testified to, there would be an inconsistency which would go to M.M.'s credibility as a witness. We agree that inconsistent statements made by a victim such as M.M. are relevant and would be admissible if offered in accordance with the rules of evidence. We conclude that this alleged error cannot be considered, for two reasons. First, the record does not contain enough information for the trial court or this court to judge whether M.M. did in fact make an inconsistent statement. Second, Putz did not seek to produce the evidence in the required manner.

If an offer of proof had been made, we could then judge whether M.M. had made inconsistent statements or recanted her story so as to put her credibility at issue. The controlling rule on this question is Neb. Rev. Stat. § 27-103(1) (Reissue 1995), which provides:

> Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

Since this rule was not followed at least to the extent of informing this court of the evidence that would have been produced if the objection had not been sustained, we cannot consider this issue.

Even if we assume that Putz' counsel's statement was a satisfactory offer of proof, such inconsistent statements of a witness must be offered in the manner legal experience teaches is fair. The controlling rule is Neb. Rev. Stat. § 27-613(2) (Reissue 1995), which provides, "Extrinsic

evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him [or her] thereon."

The subject of inconsistent statements was not touched upon in the examination of M.M., and she was therefore not given an opportunity to explain or deny any prior inconsistent statements. Consequently, any extrinsic evidence, such as Plummer's testimony, of prior inconsistent statements was not admissible. The quoted rules do not give the judge discretion in applying them, and therefore, the rules control admissibility of the evidence. See *State v. Kula,* 260 Neb. 183, 616 N.W.2d 313 (2000). This assignment of error is without merit.

*Was Trial Court's Instruction to Jury on Reasonable Doubt Erroneous?*

Putz claims that jury instruction No. 6 both lowered the State's burden of proof from that of beyond a reasonable doubt, by allowing a conviction if the jury is "'firmly convinced'" of his guilt, brief for appellant at 6, and shifted the burden to him to prove there was a "'real possibility'" of his innocence, *id.* at 7.

In instruction No. 3, the trial court instructed the jury that the State must prove each of the material elements of the crimes beyond a reasonable doubt and then listed those elements. In instruction No. 5, it instructed the jury that the State's burden to prove the material elements beyond a reasonable doubt never shifts. The court then defined reasonable doubt in instruction No. 6, as follows:

> The State has the burden of proving the Defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not true, but, in criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you *firmly convinced of the defendant's guilt.* There are very few things in this world that we know with absolute certainty, and, in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, *you are firmly convinced that the Defendant is guilty* of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there is a *real possibility that the defendant is not guilty,* you must give the Defendant the benefit of the doubt and find the Defendant not guilty.

(Emphasis supplied.) The emphasis added is to point out the phrases Putz claims made the instruction erroneous.

During the past decade, defendants have questioned several instructions that have been previously used to define reasonable doubt. In *State v. Morley,* 239 Neb. 141, 474 N.W.2d 660 (1991), the Nebraska Supreme Court considered the jury instruction defining reasonable doubt. The instruction in *Morley* defined reasonable doubt as

> "such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial

> consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

239 Neb. at 154-55, 474 N.W.2d at 669-70.

That instruction was further considered by the Eighth Circuit Court of Appeals in *Morley v. Stenberg*, 25 F.3d 687 (8th Cir. 1994) (affirming instruction on basis of decision in *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), which came down during consideration of *Morley v. Stenberg* appeal).

*Victor* involved an instruction on reasonable doubt that was identical to the instruction given in *Morley v. Stenberg* except that it substituted the word "person" for "man" at one point, "you" for "jury" at another, and "facts or circumstances" for "facts and circumstances" at a third. In *Victor*, the U.S. Supreme Court upheld the conviction, but it did state, "Though we reiterate that we do not countenance its use, the inclusion of the 'moral certainty' phrase did not render the instruction given in [the plaintiff's] case unconstitutional." 511 U.S. at 22. That opinion

would convince anyone that the instruction, although approved, should be changed to pass Constitutional muster in the future. Apparently, the questioned jury instruction here was the trial judge's attempt to use a new one that would pass muster.

The wording of the jury instructions in the *Morley* and *Victor* cases is considerably different from that in the case at hand, but these cases certainly give clear authority on the standard we should use in considering whether a given instruction purporting to define reasonable doubt meets the requirement: "The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." *Victor v. Nebraska*, 511 U.S. at 22. In *Victor*, it was concluded that " 'taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.' " *Id.* It also concluded there was no reasonable likelihood that the jurors who determined Victor's guilt applied the instruction in a way that violated the Constitution.

Putz cites and discusses cases which hold in various ways that instructions which misdefine the State's burden of proof or the defendant's presumption of innocence are prejudicial. As the above-cited authorities hold, this is clearly correct. Putz asserts that the phrases " 'firmly convinced' " and " 'real possibility' " make the instruction at issue erroneous. Brief for appellant at 9. The above authority teaches that the correctness of this jury instruction must be judged as a whole. The full sentence in which "firmly convinced" appears is: "If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find

the Defendant guilty." This sentence follows and is clearly intended to be connected to the phrase "the law does not require proof that overcomes every possible doubt." It is also limited by the sentence that follows it, which states, "If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the Defendant the benefit of the doubt and find the Defendant not guilty." There is no reasonable possibility that the jury could interpret an instruction on the meaning of reasonable doubt to decrease the State's burden below that of proof beyond a reasonable doubt merely because the instruction would allow conviction if the jury is "firmly convinced" of the defendant's guilt when the jury is also instructed to give the defendant the "benefit of the doubt" if there is a reasonable possibility that the defendant is not guilty.

We find we are not alone in that conclusion. The instruction the trial court used is identical in substance to that which is included in Federal Judicial Center, Pattern Criminal Jury Instructions § 21 (1987). In Justice Ginsburg's concurrence in *Victor v. Nebraska*, 511 U.S. 1, 27, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), she quotes the Federal Judicial Center's pattern instruction and subsequently states:

> This instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The "firmly convinced" standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a "real possibility" that the defendant is innocent. This model instruction surpasses others I

have seen in stating the reasonable doubt standard succinctly and comprehensibly.

A number of federal courts have addressed a jury instruction substantially similar to, if not the same as, that at issue in this case. In *United States v. Hunt*, 794 F.2d 1095, 1100 (5th Cir. 1986), the court found the appellant's argument that the language "'firmly convinced of a defendant's guilt'" provided no meaningful delineation of the concept to be without merit. The court agreed with the government that "'firmly convinced'" seemed little different from "'a real doubt,'" which language had earlier been approved. *Id.* The appellant also alleged that the instruction's "'real possibility that a Defendant is not guilty, you must give that Defendant the benefit of the doubt'" language shifted the burden of proof to him. *Id.* at 1101. The court found that interpretation to be "ridiculous" because nowhere did the court impose the duty on the defendant to show his or her innocence. The instruction discussed only the consequences should that real possibility exist.

In *United States v. McBride*, 786 F.2d 45, 51-52 (2d Cir. 1986), the court suggested caution in the use of the "'real possibility'" language because it could cause confusion and "may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." That court, however, did not find the use of the "'real possibility'" language to constitute reversible error. *Id.* at 52.

In *U.S. v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992), the court noted that the phrase "'firmly convinced'" in a reasonable doubt instruction had been held not to be plain error in *United States v. Bustillo*, 789 F.2d 1364 (9th Cir. 1986). The *Velasquez* court found no indication in other Ninth Circuit decisions that the circuit had any

"qualms" about the "'firmly convinced'" language. 980 F.2d at 1278. It further reasoned that the phrases "'firmly convinced'" and "'hesitate to act'" (connoting doubt sufficient to cause a person to hesitate) were essentially two ways of conveying the same definition of reasonable doubt and that in considering the instructions as a whole, the use of that language did not indicate to the jury that the prosecutor had a lesser burden. *Id.*

In *United States v. Gibson*, 726 F.2d 869, 874 (1st Cir. 1984), *cert. denied* 466 U.S. 960, 104 S. Ct. 2174, 80 L. Ed. 2d 557, the court stated that although "the sentence beginning with 'If, on the other hand' might possibly engender some confusion as to the burden of proof if it stood by itself, it is clear that when the charge is read as a whole, there was no error." The court reasoned that since the district court had also instructed the jury that the burden of proving guilt beyond a reasonable doubt was upon the government, that the burden never shifts throughout trial, and that the law does not require a defendant to prove his or her innocence, the instructions as a whole were sufficient to dispel any possible confusion arising from the reasonable doubt definition. The jury in this case was similarly instructed, and we conclude that the jury instruction on reasonable doubt was without error.

## CONCLUSION

For the reasons stated, we find no error and affirm.

AFFIRMED.

**IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA**

| | | |
|---|---|---|
| **STATE OF NEBRASKA** | ) | **DOC. CR00 PAGE 277** |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| **VICTOR B. PUTZ** | ) | |
| | ) | |
| Defendant. | ) | |

## INSTRUCTIONS OF THE COURT

(Filed Apr. 27, 2000)

* * *

## INSTRUCTION NO. 6

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not true, but, in criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and, in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the

Defendant the benefit of the doubt and find the Defendant not guilty.

GIVEN:

_____

District Judge

* * *